No. 91-401

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ELIZABETH HOLTZMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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September 9, 1991

QUESTIONS PRESENTED

In this attorney disciplinary proceeding, petitioner was reprimanded for publicly criticizing a judge for his treatment of a rape victim witness during a recently concluded criminal trial. The criticism could not have prejudiced any pending or future adjudicative proceeding, and the court below found that the criticism was not made with "actual malice" as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. The reprimand was based solely on New York's Disciplinary Rule 1-102(A)(6), which proscribes "conduct that adversely reflects on [a lawyer's] fitness to practice law." Thus, the case presents the following questions under the First and Fourteenth Amendments:

1. Whether the First Amendment bars a State from disciplining a lawyer for publicly criticizing a judge, where the lawyer's criticism does not contain false statements of fact made with "actual malice" within the meaning of *New York Times Co.* v. *Sullivan*, and the criticism could not have prejudiced any adjudicative proceeding.

2. Whether, under *Gentile* v. *State Bar of Nevada*, 111 S. Ct. 2720 (1991), and under this Court's First Amendment overbreadth doctrine, DR 1-102(A)(6) is unconstitutionally vague and overbroad if applied to a lawyer's public criticism of a judge.

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IN THE

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ELIZABETH HOLTZMAN,

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v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner Elizabeth Holtzman respectfully petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeals of New York.

OPINIONS BELOW

The opinion of the Court of Appeals of New York is reported at 78 N.Y.2d 184 and is reprinted as Appendix A. The order of the Supreme Court of New York, Appellate Division, Second Department, is unpublished and reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND DISCIPLINARY RULES INVOLVED

The Constitution of the United States provides in pertinent part:

Amendment I

> Congress shall make no law . . . abridging the freedom of speech . . . .

Amendment XIV, § 1

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . .

The New York Code of Professional Responsibility provides in pertinent part:

Disciplinary Rule 1-102(A)(6) [now DR 1-102(A)(7)]*

> A lawyer shall not . . . [e]ngage in any other conduct that adversely reflects on his fitness to practice law.

STATEMENT OF THE CASE

1. Petitioner Elizabeth Holtzman, a lawyer, is the Comptroller of the City of New York. In November 1987, while serving as the elected District Attorney of Kings County (Brooklyn), New York, she received a report from the head of her office's sex-crimes bureau that, during the course of a criminal sexual assault trial completed several weeks earlier, *People* v. *Roe*,** Judge Irving W. Levine, an elected trial

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* With the addition of a new subsection to New York's DR 1-102(A) in September 1990 (after the issuance of the discipline in this case), DR 1-102(A)(6) was redesignated DR 1-102(A)(7), and the possessive "his" was replaced with "the lawyer's." *See* N.Y. Jud. Law app. DR 1-102(A) (McKinney 1975 & Supp. 1991).

** Because the defendant was acquitted, the record of the case was sealed. *See* N.Y. Crim. Proc. Law § 160.50(1)(c) (McKinney 1981 & Supp. 1991). Accordingly, as was the convention of the parties in the courts below, the defendant will be referred to by the pseudonym "Roe," or simply as the "defendant," and the complaining witness in the *Roe* case will be referred to as the "victim" in order to preserve her privacy. Appendices E, F and G to this petition have been redacted in accordance with these conventions.

judge, had directed the complaining witness to get down on her hands and knees and demonstrate the position in which she had been raped. This report was confirmed by memoranda and a sworn affirmation of Gary Farrell, the Assistant District Attorney ("ADA") who had tried the case and witnessed the rape demonstration. App. 2e, 2f, 2g-3g.* It is undisputed that Holtzman and all of the staff members involved in the matter, including her senior advisors, were certain, based upon ADA Farrell's report, that a rape demonstration had occurred and that Judge Levine had directed it. *E.g.*, Tr. 114, 124-27, 134, 396-400, 578, 1555, 1619-20, 1675-76, 1922. Holtzman was also aware of other allegations of misconduct involving Judge Levine, including one that ultimately resulted in his removal from the bench.**

Holtzman strongly believed that the rape demonstration was improper. Accordingly, she directed one of her senior advisors to prepare letters describing ADA Farrell's report of the rape demonstration and expressing her opinion that the judge had acted improperly. The letters were addressed to the Administrator of the New York State Commission on Judi-

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* The appendices to this petition are cited in the form "App. ___." Citations to the transcript of the hearing held before the subcommittee of the Grievance Committee, and to the exhibits offered by the Grievance Committee at that hearing, are in the forms "Tr. ___" and "CX ___," respectively. Citations to petitioner Holtzman's petition in the Appellate Division, to respondent's answer to that petition, and to respondent's brief in opposition to that petition, are in the forms "AD Petition ___," "AD Answer ___," and "Resp. AD Brief ___," respectively. Finally, petitioner Holtzman's appendix of record materials in the Court of Appeals, and respondent's brief in that court, are cited in the forms "Pet. CA App. ___" and "Resp. CA Brief ___," respectively.

** Tr. 1492-94, 1729; CX 4; *see In re Levine*, 74 N.Y.2d 294, 545 N.E.2d 1205, 546 N.Y.S.2d 817 (1989) (per curiam). The New York Court of Appeals removed Judge Levine for having promised a Brooklyn political leader, Meade Esposito, that he would adjourn a proceeding against one of Esposito's friends, and for having lied to the FBI about the incident. *Id.* at 295-97, 545 N.E.2d at 1205-06, 546 N.Y.S.2d at 817-18.

cial Conduct* and to Judge Kathryn McDonald, chair of a committee that had been appointed by the Chief Judge of the Court of Appeals to address gender bias in the courts. The letters stated that they were based on the report of the ADA who had tried the case, and they described the demonstration in words virtually identical to Farrell's memoranda and sworn affirmation. The letters expressed Holtzman's opinion that the demonstration had degraded the victim, exposed her to extreme psychological pain, and had created the potential for turning a judicial proceeding into a vehicle for sexual titillation. The letters asked for appropriate measures to deal with Judge Levine's conduct. Tr. 324-25, 1514-15; App. 1d-2d; CX 7.

Holtzman considered it part of her duty as a lawyer—and particularly as a district attorney—to improve the criminal justice system. Public awareness of the rape demonstration, she believed, would help mobilize support for reform; and public awareness that the District Attorney was actively seeking to protect rape victims from humiliation in the courtroom, she believed, would encourage more rape victims to testify and would encourage people to report instances in which rape victims are mistreated in the courts. Holtzman also believed that, as an elected official, she had both the right and the obligation to inform her constituency about problems in the criminal justice system and her efforts to address them. Accordingly, she informed her staff that she wanted to make copies of her complaint letters available to the press. Tr. 1403-05, 1645-48.

A member of Holtzman's staff raised a question whether the public release of the letter to the Commission on Judicial Conduct would violate the statutory confidentiality rules applicable to the proceedings of that body. Holtzman asked Barbara Underwood, Chief of Appeals and Counsel to the District Attorney, to look into the question. Underwood, a former Yale Law School professor, checked the relevant statutes, the New York Code of Professional Responsibility and

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* The New York State Commission on Judicial Conduct is the body charged under New York law with the tasks of investigating and initially determining charges of judicial misconduct.

the case law, and concluded that there was no legal or ethical reason why the letter to the Commission or the letter to Judge McDonald could not be released to the press. In reliance on that advice, Holtzman decided to release publicly the letter to Judge McDonald, whose committee was not subject to any confidentiality rules. Underwood approved the final text of that letter as lawful and ethical. Tr. 491-502, 542-45, 554-77, 1635-36, 1638, 1643-44.

Although Holtzman's staff believed that sending and publicly releasing the letter would be lawful and ethical, it was suggested that the transcript of the *Roe* trial might reveal a justification for the demonstration, and that the letter should accordingly await receipt of the transcript. Holtzman disagreed. In her opinion, a rape demonstration by a victim could not be justified under any circumstances: any demonstration helpful to the trier of fact could be carried out through the use of a surrogate, or obviated through particularized questioning. Holtzman did not believe that the transcript would affect her complaint, which was predicated on the simple fact of the demonstration and did not depend on the precise words spoken by the judge or anyone else. Tr. 513-15, 1909-10.

Accordingly, on December 1, 1987, Holtzman sent to Judge McDonald, and publicly released, a letter stating that an ADA had reported that there had been a rape demonstration during the *Roe* trial. As quoted by the New York Court of Appeals, the pertinent portion of Holtzman's letter stated:

> Judge Levine asked the Assistant District Attorney, defense counsel, defendant, court officer and court reporter to join him in the robing room, where the judge then asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted. . . . [T]he victim reluctantly got down on her hands and knees as everyone stood and watched.
>
> In making the victim assume the position she was forced to take when she was sexually assaulted, Judge Levine profoundly degraded, humiliated and demeaned her.

App. 2a, 2d. A substantially identical letter was sent to the Commission on Judicial Conduct. CX 7. Both letters were based upon, among other things, ADA Farrell's sworn statement about the underlying facts.

2. The letter to Judge McDonald led to a public uproar, sparked by a claim by Roe's defense attorney and a court officer that no rape demonstration had even occurred. Judge Levine, it was claimed, had refused to permit it. Pet. CA App. 880-86. Disciplinary proceedings were instituted before the Grievance Committee for the Tenth Judicial District of New York, which issued a statement of charges alleging that Holtzman had "engaged in conduct that adversely reflects on her fitness to practice law by making public, as District Attorney of Kings County, false accusations of misconduct against a judge without first determining the certainty of the merit of the accusations." Pet. CA App. 89-90.* The committee's statement of charges did not specify how Holtzman's accusation was false. Then, in the course of a nine-day hearing before a subcommittee of the Grievance Committee, the Committee's counsel conceded that the rape demonstration indeed *had* occurred (Tr. 595)—contrary to what Roe's lawyer had claimed. Nonetheless, the Committee reprimanded Holtzman under DRs 1-102(A)(5) and (6) of the New York Code of Professional Responsibility.** In pertinent part, the reprimand stated simply that:

> The Committee sustained Charge[ ] One . . . of the Statement of Charges and voted to issue to you a LETTER OF REPRIMAND pursuant to Section 691.6 of the

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* The statement of charges contained three charges, of which only the first remains at issue. App. 3a. The second and third charges were dismissed by the Grievance Committee (App. 2c) and the Appellate Division (App. 3b), respectively.

** New York's DR 1-102(A)(5) provides that "[a] lawyer shall not [e]ngage in conduct that is prejudicial to the administration of justice." The Grievance Committee's finding of a violation of DR 1-102(A)(5) was not sustained by the Appellate Division (App. 3b), and was not addressed by the Court of Appeals (App. 4a).

> Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department, for *releasing your letter to Judge McDonald to the public* . . . . The aforesaid conduct is prejudicial to the administration of justice and adversely reflects on your fitness to practice law in violation of DR 1-102(A)(5) and (6) of the Code of Professional Responsibility.

App. 2c (emphasis added). The reprimand did not state that Holtzman's letter to Judge McDonald was false, or that Holtzman had known it to be false. Indeed, the reprimand contained no factual findings or discussion whatsoever. App. 1c-2c.*

3. On November 17, 1989, Holtzman began the instant proceeding in the Supreme Court of New York, Appellate Division, Second Department, for an order vacating the reprimand. From a factual standpoint, Holtzman's petition alleged that her letter to Judge McDonald was true in all material respects, and that Holtzman had been certain of its truth; as a legal matter, her petition asserted that the reprimand violated the First Amendment and that the application of DR 1-102(A)(6) to public criticism of a judge rendered the rule unconstitutionally vague and overbroad under the First and Fourteenth Amendments (AD Petition ¶¶ 55-60).

The Committee's answer to the petition did not deny Holtzman's allegations that the McDonald letter was true and that she believed it to be true. Instead, the Committee's answer stated that "the issue herein is not one of the ultimate truth or falsity" of Holtzman's letter; what mattered to the Committee was that Holtzman had made a public statement that had "impugned the integrity of Judge Levine . . . and

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* Holtzman requested that the Committee provide her with a copy of the findings made by a fact-finding subcommittee of the Grievance Committee. This request was denied. AD Petition ¶ 46. Holtzman later filed motions in the Appellate Division and the Court of Appeals requesting those findings. These motions were denied (Pet. CA App. 7; *In re Holtzman*, 1991 N.Y. LEXIS 66 (Jan. 15, 1991) (Motion No. 1363)), even though the subcommittee's findings had been presented *ex parte* to the Appellate Division by the Grievance Committee (Pet. CA App. 144 (cover letter from Committee counsel to the Presiding Justice of the Appellate Division, enclosing findings)).

thoroughly reduced public confidence in the entire judicial/legal system." AD Answer ¶¶ 8, 13. The Committee also argued that "petitioner's independent belief in the truth of her statements is irrelevant." Resp. AD Brief 14. According to the Committee, Holtzman's issuance of a public statement—whether true, false or knowingly false—violated "the duty of attorneys to avoid actions which would tend to cast the system in a negative light, thereby reducing public confidence in our system of justice." AD Answer ¶ 12.

The Appellate Division upheld the reprimand in a brief order. In pertinent part, the court stated simply:

> Ms. Holtzman now petitions this court to vacate the Letter of Reprimand.
>
> We have considered the entire record in this matter and find that petitioner Holtzman is guilty . . . of Charge One in the Statement of Charges, which alleged, *inter alia*, that Ms. Holtzman, as District Attorney of Kings County, made public accusations of misconduct against a judge without first determining the certainty of the merits of the accusations in violation of DR 8-102 and DR 1-102(A)(6).

App. 3b. Disciplinary Rule 8-102(B), to which the Appellate Division referred, provides that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." The Appellate Division's order, however, did not state how Holtzman's accusation was false.

4. The New York Court of Appeals affirmed. It upheld the Appellate Division's finding of a violation of DR 1-102(A)(6), but declined to address the question whether Holtzman had violated DR 8-102(B). Without discussion, the Court of Appeals concluded that the Appellate Division had made a "factual finding of falsity," which was "supported by the record" and "therefore binding on us." App. 4a. Like the Appellate Division, the Court of Appeals gave no indication of how Holtzman's accusation was false. Thus, no one reading the statement of charges, the reprimand, the Appellate Division's order, and the Court of Appeals' decision,

could have any inkling of the manner in which Holtzman's accusation was untrue.

In concluding that Holtzman had engaged in conduct that "adversely reflects on [her] fitness to practice law" in violation of DR 1-102(A)(6), the Court of Appeals held that Holtzman's "release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant," was "unwarranted and unprofessional, serve[d] to bring the bench and bar into disrepute, and tend[ed] to undermine public confidence in the judicial system." App. 5a. The court emphasized that Holtzman was being disciplined for having made her complaint public: "in the present case there are factors that distinguish petitioner's conduct from that prohibited under DR 8-102(B)—most notably, release of the false charges to the media—and make it particularly relevant to her fitness to practice law." App. 5a-6a.

The court rejected Holtzman's argument that she could not be disciplined without a showing that she had known her accusation to be false or had acted with "reckless disregard" of truth or falsity, as that term is defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. App. 6a. The court acknowledged that the "constitutional malice" standard of *New York Times* had not been met (App. 7a), but held that "[i]n order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard, of what a reasonable attorney would do in similar circumstances." App. 6a.

The court also rejected Holtzman's contention that DR 1-102(A)(6) was unconstitutionally vague if construed to prohibit attorney criticism of judges; explained the court: "Were we to find such language impermissibly vague, attempts to promulgate general guidelines such as DR 1-102(A)(6) would be futile." App. 5a.

REASONS FOR GRANTING THE WRIT

Last Term, in *Gentile* v. *State Bar of Nevada*, 111 S. Ct. 2720 (1991), this Court was faced with an attorney disciplinary proceeding that raised a potential conflict between "two of the most cherished policies of our civilization"—"free speech and fair trials." *Bridges* v. *California*, 314 U.S. 252, 260 (1941). The case at bar presents no such possible conflict, for it involves attorney speech that could not have had any effect upon any adjudicative proceeding. This case involves instead a class of attorney speech that is at least as important, that has even more frequently been the subject of reported disciplinary action—and that, from the standpoint of the First Amendment, has badly splintered the highest courts of no fewer than *nineteen* States: namely, speech that is critical of judges, but that presents no danger of prejudice to any adjudicative proceeding.

Never has this Court directly addressed the extent to which the First Amendment limits the professional punishment of attorneys for such speech. A variety of state supreme courts have—and have reached a variety of conclusions. In California and West Virginia, the First Amendment requires the application of the *New York Times* "actual malice" test; in Tennessee and Washington, it requires a showing of intentional or malicious falsehood before discipline may be imposed. In New Jersey, the First Amendment requires an even more stringent "clear and present danger" test. The highest courts of each of these States have effectively recognized that attorney criticism of judges amounts to nothing less than classic political speech—speech lying at the core of the First Amendment.

But in Arizona, Florida, Indiana, Iowa, Kansas, Kentucky, Missouri, Minnesota, Nebraska, New Mexico, Nevada, Oklahoma, South Dakota—and now, with the decision below, New York—the First Amendment provides far less protection to the dissenting lawyer. While employing varying analyses, the courts of last resort in each of these States have held that—to ensure that "public confidence in the judicial system" is not "undermine[d]" and that "the bench" is not

brought "into disrepute" (App. 5a)—lawyers may be disciplined even for good-faith criticism of judges. In so holding, the decision below warrants review if only because it ignores this Court's admonition that speech may not be punished "simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests . . . spared the criticism to which in a democracy other public servants are exposed.' " *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 842 (1978) (quoting *Bridges*, *supra*, 314 U.S. at 291-92 (Frankfurter, J., dissenting)). But even beyond this, and apart from the fact that the persons best situated to reveal the failings of judges are the very lawyers whose speech the decision below would chill, this case should be heard because it raises an important and recurring constitutional issue that has left the state courts in disarray.

Another reason for granting certiorari is the conflict between the decision below and this Court's decision in *Gentile*, which the court below neither distinguished nor discussed. In *Gentile*, this Court struck down a disciplinary rule that provided a "safe harbor" for a lawyer making public statements about a pending trial. The Nevada rule allowed a lawyer to "state without elaboration . . . the general nature of the . . . defense." This Court held that the rule created a "real possibility" of discriminatory enforcement, failed to provide "fair notice" of its meaning, and left a lawyer who sought its protection to "guess at its contours." *Gentile*, *supra*, 111 S. Ct. at 2731-32 (Kennedy, J., for the Court). Petitioner Holtzman was disciplined under a disciplinary rule (New York's DR 1-102(A)(6)) that proscribes "conduct that adversely reflects on [a lawyer's] fitness to practice law." She was not disciplined under the specific rule (DR 8-102(B)) applicable to a lawyer's accusations against judges, which provides: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

New York's DR 1-102(A)(6), by its terms, does not appear to apply to speech at all, and until this case there had been no reported instance of a New York court construing the rule to apply to public criticism of judges. This Court has recognized the special importance of the "void-for-vagueness"

doctrine in free-speech cases, but has never specifically decided whether a state may impose discipline on a lawyer for public criticism of a judge based on a catch-all rule when there has been no finding that the lawyer violated the specific rule governing such criticism. If applied to a lawyer's public criticism of a judge, DR 1-102(A)(6) is far vaguer than the rule invalidated in *Gentile*. If disciplinary authorities are permitted to rely on open-ended provisions such as DR 1-102(A)(6) to discipline lawyers for their criticism of judicial misconduct—and to ignore specific rules, such as DR 8-102(B), that clearly define the permissible limits of such criticism—lawyers will be subject to the threat of discriminatory enforcement, without fair notice of the meaning of the rule they are charged with violating, thereby creating the chilling effect on free speech that the "void-for-vagueness" doctrine is designed to prevent.

Finally, the construction given to DR 1-102(A)(6) by the New York Court of Appeals renders the rule substantially overbroad in that it proscribes "false allegation[s] of specific wrongdoing" against a judge that "serve to bring the bench and bar into disrepute, and tend to undermine public confidence in the judicial system." App. 5a. As so construed, DR 1-102(A)(6) cuts a broad swath into protected speech. Erroneous statements of fact have long been recognized by this Court as "inevitable in free debate," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and any rule that penalizes speech because it brings public officials into disrepute, or undermines public confidence in government institutions, goes far beyond the limited area of political speech that the First Amendment does not protect. Unless judges, and the judicial system they administer, are considered off limits to the robust debate about public issues that the First Amendment was intended to foster, DR 1-102(A)(6), as construed by the New York Court of Appeals in this case, is substantially overbroad.

I. THE DISCIPLINE OF A LAWYER WHO PUBLICLY CRITICIZES A JUDGE WITHOUT ACTUAL MALICE RAISES AN IMPORTANT FIRST AMENDMENT QUESTION ON WHICH THE STATE COURTS ARE IN CONFLICT, AND CANNOT BE RECONCILED WITH THE DECISIONS OF THIS COURT.

A. "Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so." *In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting). That much is beyond dispute. The New York Court of Appeals, however, faced an important and continually recurring constitutional question, never directly addressed by this Court, about the "special responsibility" of the legal profession: whether, under the First and Fourteenth Amendments, an attorney who publicly criticizes a judge or accuses one of misconduct, may be professionally disciplined for having done so, where there has been no showing that the attorney made her public statement with knowledge of its falsity or with serious doubts as to its truth, and where there has been no showing that the attorney's statement did interfere, or could have interfered, with any pending or future proceeding. The New York Court of Appeals answered this question squarely in the affirmative, and held that an attorney who speaks publicly and critically of a judge may constitutionally be disciplined for having failed to do "what a reasonable attorney would do in similar circumstances." App. 6a.

This holding directly conflicts with decisions of the highest courts of at least five States. The Supreme Court of Appeals of West Virginia holds that the First Amendment protects all attorney criticism of judges save "knowingly false statements or false statements made with a reckless disregard of the truth"—the "exception . . . found both in *Garrison* [v. *Louisiana*, 379 U.S. 64 (1964),] and *Pickering* [v. *Board of Education*, 391 U.S. 563 (1968),] [which] is the defamation standard for public officials" set forth in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Committee on Legal*

Ethics v. *Douglas*, 370 S.E.2d 325, 332 (W. Va. 1988), *cert. denied*, 110 S. Ct. 406 (1989); *accord Committee on Legal Ethics* v. *Farber*, 1991 W. Va. LEXIS 70 (June 27, 1991). The Supreme Court of California likewise has applied *Garrison* in the disciplinary context. *Ramirez* v. *State Bar*, 28 Cal. 3d 402, 411, 619 P.2d 399, 404, 169 Cal. Rptr. 206, 211 (1980) (en banc; per curiam).*

More speech-protective still is the holding of the Supreme Court of Tennessee that, under the First Amendment, "[a] lawyer has every right to criticize court proceedings and the judges and courts . . . after a case is concluded, so long as the criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or to bring them into disrepute." *Ramsey* v. *Board of Professional Responsibility*, 771 S.W.2d 116, 121 (Tenn.), *cert. denied*, 110 S. Ct. 278 (1989). The Supreme Court of Washington similarly holds that the First Amendment protects all attorneys who criticize the judiciary save those "who utter[ ] a statement with knowledge of its falsity." *In re Donohoe*, 90 Wash. 2d 173, 181, 580 P.2d 1093, 1097 (1978) (en banc); *see also In re Kaiser*, 111 Wash. 2d 275, 284-85, 759 P.2d 392, 398 (1988) (en banc) (applying "*Donohoe*'s . . . subjective . . . actual knowledge of . . .

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* To the same effect is *State Bar* v. *Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.), where, in setting aside a reprimand for criticism of a judge, a Texas Court of Civil Appeals appeared to recognize the applicability of *New York Times* and *Garrison*. The Supreme Court of Texas refused the State Bar's writ of error on the ground that there was "no reversible error."

The three-judge District Court in *Eisenberg* v. *Boardman*, 302 F. Supp. 1360, 1362-64 (W.D. Wis. 1969) (Fairchild, Cir. J.), held that "[w]e have no doubt" that *New York Times*' "protection against imposition of civil or criminal liability extends on the same terms to lawyers, at least for utterances made outside the course of judicial proceedings." *Id.* at 1362. The court rejected a challenge to Wisconsin's statute defining unprofessional conduct by lawyers, on the ground that the Supreme Court of Wisconsin had construed the statute "to extend protection from disciplinary proceedings to some speech which would not be protected from civil or criminal liability under *New York Times* and *Garrison*." *Id.* at 1364; *see In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932).

falsity'' test in judicial disciplinary proceeding). The Supreme Court of New Jersey has held that an attorney who criticizes a judge before whom the attorney is not ''involved in a pending criminal matter,'' may not be disciplined absent a '' 'clear and present danger' or, to use an alternative formulation, a 'serious and imminent threat' to the fairness and integrity of the judicial system.'' *In re Hinds*, 90 N.J. 604, 633-34 & n.9, 449 A.2d 483, 498-99 & n.9 (1982).

Yet this only begins to describe the hodgepodge of holdings among the courts of the several States. The Supreme Courts of Missouri and Minnesota, for example, have expressly rejected the argument that ''the 'with knowledge or in reckless disregard' standard used in defamation cases must be strictly applied in disciplinary proceedings,'' *In re Westfall*, 808 S.W.2d 829, 837 (Mo. 1991) (en banc), *petition for cert. filed*, 60 U.S.L.W. ____ (U.S. Sept. 9, 1991) (No. 91-____), and instead appear to hold that the First Amendment requires only what might be described as a watered-down version of the *New York Times* test, one in which ''the standard for determining actual malice must be objective.'' *In re Graham*, 453 N.W.2d 313, 321, *reinstatement ordered*, 459 N.W.2d 706 (Minn.), *cert. denied*, 111 S. Ct. 67 (1990). In these States, the test is ''whether a reasonably prudent person would have had serious doubts as to the truth of the publication, [and not] whether the [attorney] in fact entertained such doubts.'' *In re Westfall*, *supra*, 808 S.W.2d at 836-37.

And still other courts, like the court below, accord the dissenting lawyer scant First Amendment protection, if any at all. The Supreme Courts of five States—Arizona, South Dakota, Iowa, Florida and Nevada—hold that any criticism deemed to undermine public confidence in the judiciary is, by that very fact, not protected by the Constitution.* The

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* **Arizona**: *In re Riley*, 142 Ariz. 604, 612-13, 691 P.2d 695, 703-04 (1984) (en banc) (even during an election campaign, attorneys have no First Amendment right to ''call into question decisions of the court or question the integrity of the judicial system . . . except on appeal [or through] disciplinary proceedings where appropriate''); **South Dakota**: *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979) (''The right of free speech does not 'give a law-

Supreme Courts of Indiana and Kansas maintain that an attorney may constitutionally be held strictly accountable for false statements about judges, without regard to the due care or state of mind of the attorney.* The Supreme Court of Oklahoma appears to agree, although its opinion contains some seemingly contradictory language.** The Supreme

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yer the right to openly denigrate the court in the eyes of the public.' "); *see also In re Gorsuch*, 76 S.D. 191, 198, 75 N.W.2d 644, 648 (1956); **Iowa:** *In re Frerichs*, 238 N.W.2d 764, 767-68 (Iowa 1976) (en banc) (regardless of attorney's "subjective intent," criticism that undermines "the public's belief in the integrity of the court" is unethical and "generally held not protected" by the First Amendment); *Committee on Professional Ethics & Conduct* v. *Hurd*, 360 N.W.2d 96, 105 (Iowa 1985) (en banc) ("Our cases make it clear that a lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct."); **Florida:** *In re Shimek*, 284 So. 2d 686, 689-90 (Fla. 1973) (en banc; per curiam) (as "the judicial process as an institution of government is a sacred proceeding," criticism that "brings into scorn and disrepute the administration of justice" is not protected by the First Amendment); **Nevada:** *In re Raggio*, 87 Nev. 369, 371, 487 P.2d 499, 500 (1971) (per curiam) (no First Amendment protection where "essential public confidence in our system of administering justice may have been eroded" by attorney criticism).

* **Indiana:** *In re Terry*, 271 Ind. 499, 502-03, 394 N.E.2d 94, 95-96 (per curiam) (rejecting respondent's arguments that "his comments and speech were permitted under the First Amendment," and that "the cases sounding in libel and slander" control; "false accusations against a Judge" deemed punishable because they "do[ ] nothing but erode the public's confidence in an impartial adjudicatory process"), *cert. denied*, 444 U.S. 1077 (1980); **Kansas:** *State* v. *Nelson*, 210 Kan. 637, 640-42, 504 P.2d 211, 214-16 (1972) (per curiam) (an attorney "may not, by unfounded charges, create disrespect for courts or their decisions and if he does so he may be properly disciplined"; *New York Times* held "clearly inapplicable").

** **Oklahoma:** The Oklahoma court stated that "[t]here is no First Amendment protection for false statements of fact. A statement shown to be false therefore subjects an attorney to disciplinary sanctions." A paragraph in the opinion, however, might be read as equating a finding of "falsity" with a finding that the attorney did not have "a rational basis for having concluded that [his] remarks had a factual basis." *State ex rel. Oklahoma Bar Ass'n* v. *Porter*, 766 P.2d 958, 969 (Okla. 1988); *see* 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 8.2:201 (2d ed. 1990). The court held that discipline was unwarranted because there was an "absence of a

Courts of three other States—Nebraska, Kentucky, and New Mexico—hold that some sort of negligence standard may constitutionally be applied.*

Today, as far as the right of lawyers to criticize the judiciary is concerned, the First Amendment means many things in many States. If only to quell this constitutional cacophony, certiorari should be granted.

B. Even aside from the conflict among the States, however, the decision below warrants review because it resolved

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showing of falsity." At all events, the court expressly rejected the proposition "that First Amendment protection be afforded to ultimately false statements shown to be made in good faith such as in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968)." 766 P.2d at 969. *But see Ramsey* v. *Board of Professional Responsibility, supra*, 771 S.W.2d at 121-22 (relying on *Porter* in support of knowing-falsity standard).

* **Nebraska:** *State ex rel. Nebraska State Bar Ass'n* v. *Michaelis*, 210 Neb. 545, 557, 559, 316 N.W.2d 46, 53-54 (per curiam) (attorney's leveling of "charges [he] knew or should have known to be unwarranted, was unethical and unprofessional conduct tending to bring the bench and bar of this state into disrepute"; no "free speech . . . right to openly denigrate the court in the eyes of the public"), *appeal dismissed and cert. denied*, 459 U.S. 804 (1982); **Kentucky:** *Kentucky Bar Ass'n* v. *Heleringer*, 602 S.W.2d 165, 178 (Ky. 1980) (per curiam) (same, using virtually identical language), *cert. denied*, 449 U.S. 1101 (1981); *see also Kentucky State Bar Ass'n* v. *Lewis*, 282 S.W.2d 321, 326 (Ky. 1955) (per curiam); **New Mexico:** *In re Meeker*, 76 N.M. 354, 365, 414 P.2d 862, 869 (1966) (right to criticize courts does not permit charges "without adequate proof"), *appeal dismissed and cert. denied*, 385 U.S. 449 (1967).

The cases cited in the foregoing discussion constitute only a portion of the reported disciplinary proceedings involving criticism of judges by lawyers. For additional case law, see generally William P. Hoye, *Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys*, 38 Drake L. Rev. 31 (1988-89) [hereinafter Hoye, *Silencing the Advocates*]; Jeanne D. Dodd, Comment, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. Ky. L. Rev. 129 (1988); Sandra M. Molley, Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame Law. 489 (1981); Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. Rev. 922 (1974); *Judicial Criticism*, Law Man. on Prof. Conduct (ABA/BNA) 101:601 (1987); W.E. Shipley, Annotation, *Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action*, 12 A.L.R.3d 1408 (1967 & Supp. 1991).

an important First Amendment question in a fashion utterly irreconcilable with the decisions of this Court. This Court has repeatedly observed that speech of the sort involved in this case—"the dissemination of information relating to alleged governmental misconduct"—is " 'speech which has traditionally been recognized as lying at the core of the First Amendment.' " *Gentile* v. *State Bar of Nevada*, *supra*, 111 S. Ct. at 2724 (opinion of Kennedy, J.) (quoting *Butterworth* v. *Smith*, 110 S. Ct. 1376, 1381 (1990)). And "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575 (1980), which—again—is precisely the subject of the speech at issue here. As if this were not enough, this case involves a statement made by one elected official (a district attorney) about another elected official (an elected judge). This case indisputably involves nothing short of core political speech, and the New York Court of Appeals failed to cite any compelling interest that would justify its repression.

1. What rendered the *New York Times* rule inapplicable in the view of the court below, and what was said to justify the imposition of professional discipline, was the fact that " '[p]rofessional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.' " App. 6a (quoting *In re Terry*, *supra*, 271 Ind. at 502, 394 N.E.2d at 95). The reprimand was justified, explained the Court of Appeals, principally because petitioner's "attack[ ]" on Judge Levine "serve[d] to bring the bench and bar into disrepute, and tend[ed] to undermine public confidence in the judicial system." App. 5a. Thus, the principal state interest invoked by the Court of Appeals was the reputation of the judiciary.

Under the First Amendment, however, this will not do. This Court's "prior cases have firmly established . . . that injury to official reputation is an insufficient reason 'for

repressing speech that would otherwise be free,' " and that "the institutional reputation of the courts" is "entitled to no greater weight in the constitutional scales." *Landmark Communications, Inc.* v. *Virginia*, *supra*, 435 U.S. at 841-42 (quoting *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 272-73). And as the Court said in *Bridges* v. *California*, *supra*, 314 U.S. at 270-71, judicial reputation is not protected at all by the punishment of speech:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. [Footnote omitted.]

This Court has made clear, moreover, that only "the substantive evil of unfair administration of justice" could be "plausibly associated with restricting publications" about judges and judicial proceedings, and—even then—only when the speech "touch[es] upon *pending* litigation" and "actually *does* threaten to change the nature of legal trials." *Id.* at 271 (emphasis added). For "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile*, *supra*, 111 S. Ct. at 2745 (Rehnquist, C.J., for the Court). That substantive evil, implicated in *Gentile*, is not and cannot be claimed to have existed here: Holtzman's extrajudicial statement did not concern pending litigation; indeed, the charge (under DR 1-102(A)(5)) that her speech was "prejudicial to the administration of justice" was dropped by the Appellate Division below. App. 3b.

2. The other interest said by the New York Court of Appeals to be served by the reprimand was the need to regu-

late the "judgment" of lawyers or their "ability to practice law." App. 6a. At best, this asserted state interest is simply a bootstrapping way of restating the desire to protect the collective reputation of the judiciary. And certainly the regulation of attorney criticism of judges is a most peculiar and inadequate way of regulating the "judgment" or "fitness" of lawyers. Every day in this country attorneys file, in good faith, countless complaints and counterclaims, and even indictments and informations, alleging gross wrongs and serious crimes on evidence no stronger (and often weaker) than the sworn word of an eyewitness assistant district attorney. When such pleadings are dismissed for want of the adequate level of proof, as daily scores of such pleadings are, disciplinary proceedings do not follow.

Indeed, the very genesis of this case makes clear that the reprimand of petitioner was not a regulation of lawyerly "judgment." Petitioner was *not* charged with having carelessly or recklessly transmitted allegations of misconduct to the New York Commission on Judicial Conduct or to Judge McDonald's bias committee; she was charged with, and reprimanded for, having "released" those allegations "to the press." App. 1c, 2c. The Grievance Committee's counsel consistently emphasized on the record below that it "absolutely" had not been "improper for [petitioner Holtzman] to complain"—privately—about Judge Levine to the Commission on Judicial Conduct or to Judge McDonald, and that the Committee had "[n]ever ever charged" otherwise; indeed, the Committee's counsel explained that "it has been pointed out from the beginning it was her *obligation*" to make her complaint about the judge. Tr. 1809 (emphasis added); Pet. CA App. 21-22, 1098-99. What made Holtzman's letter subject to discipline in the eyes of respondent and the court below was first, and "most notably," that it was "release[d] . . . to the media" (App. 5a-6a; *accord* App. 1c-2c; Pet. CA App. 1098-99); and second, that this publicly released letter contained an accusation against a judge. Yet these two facts are precisely what, under this Court's decisions, should have guaranteed petitioner's speech the protection of the First Amendment.

3. By thus transforming constitutional virtue into disciplinary vice, the New York Court of Appeals stood the law on its head. And this transformation cannot be justified by the supposed "finding" of falsity by the Appellate Division. As an initial matter, there was no such express finding, and whatever "finding" the Court of Appeals read into the Appellate Division order could not possibly survive the independent factual review required by the First Amendment decisions of this Court, *e.g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), or withstand the test of materiality, *see Masson* v. *New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2432-33 (1991). More importantly for the purpose of this petition, however, the court below provided no basis, other than the two inadequate interests discussed above, for refusing to apply the "actual malice" test of *New York Times Co.* v. *Sullivan*, *supra*—a test it *conceded* was not met in this case. In fact, the very considerations that led this Court to apply *New York Times* in the diverse contexts of criminal libel, *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), and the discipline of public employees, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), compel its application here as well.

Like this case, *Garrison* involved an elected district attorney who had made an accusation of misconduct against a judge (eight judges, in fact, about whom Mr. Garrison raised, at a press conference, "questions" of "racketeer influences," 379 U.S. at 65-66). There, as here, the matter was publicly prosecuted by a state official (in *Garrison*, through a criminal libel action brought by a state attorney general, *State* v. *Garrison*, 244 La. 787, 794, 154 So. 2d 400, 402 (1963), *rev'd*, 379 U.S. 64 (1964)). There, as here, the interest sought to be vindicated was a public one (according to the Bill of Information in *Garrison*, to enforce a "statute of the State of Louisiana" and thus to vindicate "the peace and dignity of the same," 244 La. at 804, 154 So. 2d at 406). Yet this Court found "no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials, entitled to the benefit of the *New York Times* rule," for "[t]he accusation concerned the

judges' conduct of the business of the Criminal District Court." 379 U.S. at 76.

Pickering involved a public schoolteacher who was disciplined for having written a public letter harshly critical of the school board under which he served. As here, the discipline was justified in the name of the public interest, on the ground "that the publication of the letter was 'detrimental to the . . . administration' " of a public institution. 391 U.S. at 564. And, as here, "[n]o evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on . . . the administration" of that institution, "and no specific findings along those lines were made." *Id.* at 567. This Court again applied *New York Times*. Citing *Garrison*, the Court concluded that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Id.* at 574.

Thus, what *Landmark* and *Bridges* teach as to truthful speech, *Garrison* and *Pickering* establish for speech said to be untrue: that, regardless of the type of proceeding involved, injury to official or judicial reputation provides an insufficient reason for the repression of speech that would otherwise be free. For "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 271-72 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). "[A] rule that would impose strict liability on a publisher for false assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988). And the " 'mere labels' of state law" provide "no talismanic immunity from [these] constitutional limitations." *New York Times*, *supra*, 376 U.S. at 269.

The decision below—which involved not only the "quasi-criminal" context of attorney discipline, *In re Ruffalo*, 390 U.S. 544, 551 (1968), but also the highly publicized reprimand of a prominent lawyer and public official—creates precisely the speech-chilling effect that the First Amendment

does not allow. The decision below "invites the speaker to weigh every word," and "invites political opponents to scan statements for the least suspicion of a false statement of fact" and bring "disciplinary proceedings against lawyers . . . who express themselves too freely. Many will conclude that it is wise to keep quiet," *In re Westfall*, *supra*, 808 S.W.2d at 849 (Blackmar, C.J., dissenting), with the result that those who know best about failings in our system of justice would be silenced. This case calls out for review by this Court.

II. THE APPLICATION OF DR 1-102(A)(6) TO A LAWYER'S PUBLIC CRITICISM OF A JUDGE RENDERS THE RULE UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AND IS INCONSISTENT WITH THIS COURT'S DECISION IN *GENTILE* v. *STATE BAR OF NEVADA*.

A. New York's Code of Professional responsibility contains a specific Disciplinary Rule—DR 8-102(B)—that sets forth the professional standard governing the precise situation that gave rise to the proceeding below—Holtzman's release of a letter accusing a judge of misconduct. The rule provides clear guidance to lawyers by adopting a standard that, by its terms, is at least as speech-protective as that established in *New York Times Co.* v. *Sullivan*. It provides: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." The New York Court of Appeals did not, and could not, sustain the reprimand against Holtzman on the basis of a violation of DR 8-102(B). Instead, the court relied solely on DR 1-102(A)(6), which provides: "A lawyer shall not . . . [e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law."

Until the decision below, there was no reported New York case invoking DR 1-102(A)(6) to discipline a lawyer for making accusations against a judge. Indeed, the rule had apparently never been invoked against any speech by a lawyer. On only two occasions since New York's adoption of the Code

of Professional Responsibility in 1970 had any New York court dealt with the discipline of a lawyer for public accusations against a judge. In the first case, *In re Baker*, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837, *cert. denied*, 404 U.S. 915 (1971), the Court of Appeals, without opinion, affirmed a decision of a lower court that had sustained discipline after applying the *New York Times Co.* v. *Sullivan* standard without mentioning any rule of professional conduct.* *Baker* caused commentators, and at least one court, to conclude that the *New York Times* standard constituted the rule of professional discipline in New York. *Committee on Legal Ethics* v. *Douglas*, *supra*, 370 S.E.2d at 330; Hoye, *Silencing the Advocates*, *supra*, 38 Drake L. Rev. at 52; *Judicial Criticism*, Law Man. on Prof. Conduct (ABA/BNA) 101:607 (1987).

In the other case, *Justices of the Appellate Division* v. *Erdmann*, 33 N.Y.2d 559, 559-60, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441, 441 (1973) (per curiam), the Court of Appeals, without any mention of DR 1-102(A)(6), reversed a decision of a lower court that had imposed discipline on an attorney for publicly asserting that the justices of the Appellate Division were "whores who became madams" and had obtained their jobs through bribes. In so ruling, the court found no violation of a disciplinary rule and rejected the argument of its dissenting judges that the lawyer should be disciplined under an Ethical Consideration (EC 8-6) that admonishes a lawyer to be "certain of the merit of the accusation." *Id.* at 565, 301 N.E.2d at 430, 347 N.Y.S.2d at 446 (Gabrielli, J., dissenting).** Thus, the decision below was the first indication by a New York court that DR 1-102(A)(6) is applicable to a lawyer's accusation against a judge.

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* *In re Baker*, 34 App. Div. 2d 229, 232-33, 311 N.Y.S.2d 70, 73-74 (4th Dep't 1970), *aff'd mem.*, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837, *cert. denied*, 404 U.S. 915 (1971).

** Ethical considerations, while part of the Code of Professional Responsibility, are described in the Preliminary Statement to the Code as aspirational only, and have never been adopted as rules of discipline by the New York courts.

As so applied, DR 1-102(A)(6) is void for vagueness for the same reasons that this Court found Nevada Rule 177(3) unconstitutionally vague in *Gentile*, a case decided by this Court on June 27, 1991, but not mentioned in the decision below four days later. Nevada Rule 177 dealt with the subject of "Trial Publicity," and proscribed certain categories of public statements by lawyers that affect a pending adjudicative proceeding. Rule 177(3)—a so-called "safe harbor"—provided that a lawyer "may state without elaboration . . . the general nature of the . . . defense." This Court held that Rule 177(3)

> provides insufficient guidance [to a lawyer] because 'general' and 'elaboration' are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Gentile v. *State Bar of Nevada*, *supra*, 111 S. Ct. at 2731 (Kennedy, J., for the Court). As with Rule 177(3) in *Gentile*, DR 1-102(A)(6) has had "no settled usage or tradition" with regard to lawyers' speech, let alone criticism of judges. The only rule containing such a "usage or tradition" was the rule Holtzman did *not* violate—DR 8-102(B).

Justice Kennedy's opinion for the Court noted that Gentile was disciplined despite having made a "conscious effort at compliance" with Rule 177, thus demonstrating that the rule "creates a trap for the wary as well as the unwary." 111 S. Ct. at 2732. Rule 177(3), by its terms, attempts to define the categories of statements that are permissible during a pending trial. Gentile was trapped because the definition failed "to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement." *Id.* at 2749 (O'Connor, J., concurring).

As this case shows, lawyers face an equally dangerous trap when DR 1-102(A)(6) is applied to public accusations against judges. Holtzman did exactly what Gentile did—tried to comply with the rules of professional discipline. She sought the

advice of highly competent counsel who studied the text and interpretation of DR 8-102(B), the only rule in the Code dealing with accusations against judges, and concluded that the public release of her letter to Judge McDonald—the truth of which Holtzman and all of her senior advisors were certain, and had good reason to be certain—was lawful and ethical.

No lawyer would have had any reason to believe that DR 1-102(A)(6) would be construed as establishing an additional, and less speech-protective, standard governing lawyers' accusations against judges than was provided in DR 8-102(B). And surely it would have required the talents of a clairvoyant to have even guessed—as the Court of Appeals held—that a new, less protective rule was applicable because the accusation against the judge was disseminated to the public through the media. Public discussion about the criminal justice system, including the manner in which a judge treats a rape victim during a trial, involves a core area of protected speech, and surely has a special need for immunity from a standardless rule such as DR 1-102(A)(6).

Nothing in the decision of the New York Court of Appeals provides the type of limiting construction that has previously persuaded this Court to reject vagueness challenges to state statutes. *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77, 85-87 (1949); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-73 (1942). According to the court below, "the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed." The court then concluded that Holtzman "was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct under the circumstances described, could be held to reflect adversely on her fitness to practice law." App. 5a.

One searches in vain, however, for a standard to guide attorneys who are contemplating criticisms against judges. The Court of Appeals recited that the allegation was not a "generalized criticism" but involved the "release to the media of a false allegation of specific wrongdoing, made

without any support other than the interoffice memoranda of a newly admitted trial assistant." The court concluded that "[p]etitioner knew or should have known that such attacks are unwarranted and unprofessional, serve to bring the bench and bar into disrepute, and tend to undermine public confidence in the judicial system." App. 5a.

This is not a "standard" that cures the defects of a regulation that on its face provides no standard at all. A lawyer contemplating public criticism of a judge must, under this "standard," consider whether a "reasonable lawyer" would, or should, know that the criticism will "tend to undermine public confidence in the judicial system." Holtzman in fact believed strongly that her criticism of the trial judge's treatment of a rape victim, coming from an elected prosecutor, would enhance, not undermine, public confidence in the judicial system; indeed, she was confident that the system would rectify the problem that she saw. A lawyer who, like Holtzman, is certain of the truth of her allegations, but who may be mistaken (although she was not), is completely in the dark as to whether a false statement of fact will "bring the bench and bar into disrepute." Further, the Court of Appeals did not indicate the level of inquiry that a "reasonable lawyer" must conduct before publicly accusing a judge of wrongdoing. Holtzman, for example, relied on the sworn affirmation (not only an "interoffice memorandum") of the assistant district attorney who had witnessed the demonstration, but the Court of Appeals noted that he was merely a "newly admitted" member of the bar, raising the question of how long a lawyer must be admitted before one can safely assume that he or she is not a liar.

The decision below leaves lawyers in New York, and any other jurisdiction that follows it, at the mercy of disciplinary officials and judges who can decide, on a case-by-case basis, whether an accusation against a judge "reflects adversely" on a lawyer's fitness to practice law. Faced with this threat to one's professional career, the only safe course for a lawyer is silence. That is precisely what this Court's void-for-vagueness doctrine seeks to avoid.

Finally, in rejecting petitioner's contention that DR 1-102(A)(6) is unconstitutionally vague as applied to lawyers' public criticism of judges, the Court of Appeals relied upon an argument that not only is circular, but is, under this Court's decisions, flatly wrong. The Court of Appeals argued that "attempts to promulgate general guidelines such as DR 1-102(A)(6) would be futile" if the rule were to be found impermissibly vague. But DR 1-102(A)(6), as a general guideline, was not in peril. The court could simply have construed it to be inapplicable to lawyers' public criticisms of judges. *See, e.g., Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); *Chaplinsky* v. *New Hampshire*, *supra*, 315 U.S. at 572-73; *Cox* v. *New Hampshire*, 312 U.S. 569, 575-76 (1941). For there is no dispute here that DR 1-102(A)(6) could be applied to activities beyond the zone protected by the First Amendment. The Court of Appeals could have narrowly construed DR 1-102(A)(6) when this case was presented to it below; and it would still be free to do so if the rule were held, as it should be, void for vagueness as applied in this case.

B. Even if DR 1-102(A)(6), as construed by the court below, were deemed sufficiently clear to cure the defect of vagueness, it would be substantially overbroad in accordance with the standards established by this Court in decisions such as *City of Houston* v. *Hill*, 482 U.S. 451 (1987); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); and *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

The Court of Appeals drastically expanded the scope of DR 1-102(A)(6) by construing it to proscribe "false allegation[s] of specific wrongdoing" against a judge that "serve to bring the bench and bar into disrepute, and tend to undermine public confidence in the judicial system." App. 5a. This construction is manifestly overbroad: it encompasses not only speech that is *un*protected (knowingly or recklessly false accusations), but speech that *is* protected, such as false accusations made in the good-faith belief that they are true. And, as construed by the Court of Appeals, the rule would reach

a " 'substantial amount of constitutionally protected conduct.' " *City of Houston* v. *Hill*, *supra*, 482 U.S. at 458 (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). This Court has long recognized that erroneous statements of fact are "inevitable in free debate," and that punishing them "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 340; *see also New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 271-72. Indeed, since New York's DR 8-102(B) proscribes constitutionally unprotected accusations (knowingly false ones), DR 1-102(A)(6), as applied to lawyers' accusations against judges, primarily occupies the domain of constitutionally protected speech. *See City of Houston* v. *Hill*, *supra*, 482 U.S. at 468-69.

As construed by the Court of Appeals, DR 1-102(A)(6) stands as a constant threat to lawyers seeking to bring to the attention of the public the wrongdoings of judges, since such lawyers could be disciplined for engaging in constitutionally protected speech. This overbroad construction forces lawyers to test the constitutionally permissible scope of DR 1-102(A)(6) through piecemeal challenges by those few who may be "hardy enough" to endure disciplinary proceedings and to risk sanctions. *See Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). The doctrine of overbreadth, like the void-for-vagueness doctrine, is designed to provide "breathing room" for First Amendment rights. The court below, by construing DR 1-102(A)(6) as applicable to Holtzman's criticism of Judge Levine, has substituted the suffocation of silence for the breathing room of public debate.

* * *

This Court, having in the past addressed issues of lawyer advertising, solicitation, bar admission standards, residency requirements and, most recently, lawyers' speech that affects a pending adjudicative proceeding, has the opportunity in this case to address core First Amendment issues involving a lawyer's role in the judicial system and in the political process of this country. If allowed to stand, the decision of the court below would effectively strip lawyers of their fundamental right to criticize the most important officials in our system of justice—the judges. A matter of such importance to the profession and to the Nation plainly warrants review by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD W. NUSSBAUM
NORMAN REDLICH*
ROBERT B. MAZUR
GEORGE T. CONWAY III
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Attorneys for Petitioner
Elizabeth Holtzman

* Counsel of Record

September 9, 1991

APPENDICES

APPENDIX A

[Opinion of the Court of Appeals of New York, July 1, 1991]

State of New York Court of Appeals

2 No. 123
In the Matter of Elizabeth Holtzman, &c.,

Appellant,

Grievance Committee for the Tenth Judicial District,

Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Norman Redlich, for appellant.
Grace D. Moran, for respondent.
New York Civil Liberties Union, et al. and City Bar Association Committee on Professional Responsibility, *amici curiae*.

PER CURIAM:

Petitioner brought this proceeding pursuant to 22 NYCRR 691.6(a) to vacate a Letter of Reprimand issued by the Grievance Committee for the Tenth Judicial District.

The charge of misconduct that is relevant to this appeal was based on the public release by petitioner, then [2] District Attorney of Kings County,* of a letter charging Judge Irving Levine with judicial misconduct in relation to an incident that

* Although all proceedings conducted by the Grievance Committee were kept confidential and the decision of the Appellate Division was not published (*see*, 22 NYCRR 691.4[j]), petitioner has expressly waived any right to confidentiality on this appeal.

allegedly occurred in the course of a trial on criminal charges of sexual misconduct (Penal Law § 130.20), and was reported to her some six weeks later. Specifically, petitioner's letter stated that:

> Judge Levine asked the Assistant District Attorney, defense counsel, defendant, court officer and court reporter to join him in the robing room, where the judge then asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted. * * * The victim reluctantly got down on her hands and knees as everyone stood and watched. In making the victim assume the position she was forced to take when she was sexually assaulted, Judge Levine profoundly degraded, humiliated and demeaned her.

The letter, addressed to Judge Kathryn McDonald as Chair of the Committee to Implement Recommendations of the New York State Task Force on Women in the Courts, was publicly disseminated after petitioner's office issued a "news alert" to the media.

Following a dispute over the truth of the accusations, Robert Keating, as Administrative Judge of the New York City Criminal Court, conducted an investigation into the allegations of judicial misconduct. His report, dated December 22, 1987, concluded that petitioner's accusations were not supported by the [3] evidence. Upon receipt of the report, Albert M. Rosenblatt, then Chief Administrative Judge, referred the matter to the Grievance Committee for inquiry as to whether petitioner had violated the Code of Professional Responsibility.

Some six months later, the Grievance Committee sent petitioner a private Letter of Admonition in which it stated that "the totality of the circumstances presented by this matter require that you be admonished for your conduct." Petitioner's misconduct, the Committee concluded, violated DR 8-102(B), DR 1-102(A)(5),(6) and EC 8-6 of the Code of Professional Responsibility.

In July 1988, after petitioner requested a subcommittee hearing pursuant to 22 NYCRR 691.6(a), she was served with three formal charges of misconduct under DR 8-102(B) and DR 1-102(A)(5) and (6). Charge One alleged that petitioner had engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against Judge Levine. Charge Two related to petitioner's subsequent videotaping of the complaining witness's statement under oath, and release of the audio portion of the tape to the media, despite her knowledge that the complainant would be a necessary witness in other investigations. Charge Three related to a later press release in which petitioner stated that she had knowledge of other allegations of misconduct involving the Judge, thereby further demeaning him. Only Charge One is in issue on this appeal.

[4] The conduct set forth in Charge One, allegedly demonstrating petitioner's unfitness to practice law, included release of the letter to the media (1) prior to obtaining the minutes of the criminal trial, (2) without making any effort to speak with court officers, the court reporter, defense counsel or any other person present during the alleged misconduct, (3) without meeting with or discussing the incident with the trial assistant who reported it, and (4) with the knowledge that Judge Levine was being transferred out of the Criminal Court, and the matter would be investigated by the Court's Administrative Judge as well as the Commission on Judicial Conduct (to which the petitioner had complained).

After hearings, the subcommittee submitted its findings to the full Grievance Committee. The Committee sustained the first and third charges and issued petitioner a Letter of Reprimand, which was also private (22 NYCRR 691.6[a]). The letter, dated October 19, 1989, stated that the Committee sustained Charges One and Three, and concluded that petitioner's conduct was "prejudicial to the administration of justice and adversely reflects on [her] fitness to practice law in violation of DR 1-102(A)(5) and (6) of the Code of Professional Responsibility." No mention was made of DR 8-102(B).

Petitioner then brought this proceeding seeking to vacate the Letter of Reprimand. The Appellate Division concluded that the record supported the Committee's findings as to Charge One, more specifically that petitioner's conduct violated DR 8-102 and DR 1-102(A)(6). We now affirm, agreeing with both the [5] Grievance Committee and the Appellate Division that petitioner's conduct violated DR 1-102(A)(6), and we reach no other question.

Petitioner relies primarily on two arguments. First, she asserts that the allegations concerning Judge Levine's conduct were true or at least not demonstrably false. Second, petitioner asserts that her conduct violates no specific disciplinary rule and further that DR 1-102(A)(6), if applicable, is unconstitutionally vague. These contentions are without merit.

The factual basis of Charge One is that petitioner made false accusations against the Judge. This charge was sustained by the Committee and upheld by the Appellate Division, and the factual finding of falsity (which is supported by the record) is therefore binding on us.

As for the contention that petitioner's conduct did not violate any provision of the Code, DR 1-102(A)(6) (now DR 1-102[A][7]) provides that a lawyer shall not "[e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law." As far back as 1856, the Supreme Court acknowledged that "it is difficult if not impossible, to enumerate and define, with legal precision, every offense for which an attorney can be removed" (*Ex Parte Secombe*, 60 US [19 How] 9, 14). Broad standards governing professional conduct are permissible and indeed often necessary (*see*, *In re Charges of Unprofessional Conduct Against N.P.*, 361 NW2d 386, 395 [Minn], *appeal dismissed* 474 US 976).

[6] Such standards are set forth in Canon 1 and particularly in DR 1-102. An earlier draft of the Code listed "conduct degrading to the legal profession" as a basis for a finding of misconduct under DR 1-102, but this provision was replaced by the "fitness" language of DR 1-102(A)(6) and the "prejudicial to the administration of justice" standard of DR 1-102(A)(5) (*see*, Annotated Code of Professional Responsibility, Textual and Historical Notes, at 12). The

drafters of the Code refined the provisions to provide attorneys with proper ethical guidelines. Were we to find such language impermissibly vague, attempts to promulgate general guidelines such as DR 1-102(A)(6) would be futile.

Rather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed (*see*, *Committee on Professional Ethics v Durham*, 279 NW2d 280, 283-284 [Iowa]; *see also*, *In re Ruffalo*, 390 US 544, 554-555 [White, J., concurring]; *Matter of Cohen*, 139 AD2d 221).

Applying this standard, petitioner was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct under the circumstances described, could be held to reflect adversely on her fitness to practice law. Indeed, her staff, including the person assigned the task of looking into the ethical implications of release to the press, counseled her to delay publication until the trial minutes were received.

[7] Petitioner's act was not generalized criticism but rather release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant, aimed at a named judge who had presided over a number of cases prosecuted by her office (*see*, *Matter of Terry*, 271 Ind 499, 502-503; 394 NE2d 94, 95-96, *cert. denied* 444 US 1077). Petitioner knew or should have known that such attacks are unwarranted and unprofessional, serve to bring the bench and bar into disrepute, and tend to undermine public confidence in the judicial system (*see*, *Matter of Bevans*, 225 App Div 427, 431).

Therefore, petitioner's conduct was properly the subject of disciplinary action under DR 1-102(A)(6), and it is of no consequence that she might be charged with violating DR 8-102(B) based on this same course of conduct (*see*, *In re Huffman*, 289 Ore 515, 522, 614 P2d 586, 589; *Durham*, 279 NW2d at 285, *supra*; *Matter of Terry*, 271 Ind at 501, 394 NE2d at 94, *supra*). Indeed, in the present case there are factors that distinguish petitioner's conduct from that prohibited

under DR 8-102(B)—most notably, release of the false charges to the media—and make it particularly relevant to her fitness to practice law.

Petitioner contends that her conduct would not be actionable under the "constitutional malice" standard enunciated by the Supreme Court in *New York Times v Sullivan* (376 US 254). Neither this Court nor the Supreme Court has ever extended the [8] *Sullivan* standard to lawyer discipline and we decline to do so here.

Accepting petitioner's argument would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth (*see*, *St. Amant v Thompson*, 390 US 727, 731; *Trails West, Inc. v Wolff*, 32 NY2d 207, 219). Such a standard would be wholly at odds with the policy underlying the rules governing professional responsibility, which seeks to establish a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." (Code of Professional Responsibility, Preliminary Statement.)

Unlike defamation cases, "[p]rofessional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations." (*Matter of Terry*, 271 Ind at 502, 394 NE2d at 95, *supra*.) It follows that the issue raised when an attorney makes public a false accusation of wrongdoing by a judge is not whether the target of the false attack has been harmed in reputation; the issue is whether that criticism adversely affects the administration of justice and adversely reflects on the attorney's judgment and, consequentially, her ability to practice law (*see*, *In re Disciplinary Action Against Graham*, 453 NW2d 313, 322 [Minn], *cert. denied* 111 SCt 67).

[9] In order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard, of what a reasonable attorney would do in similar circumstances (*see*, *Louisiana State Bar Ass'n v Karst*, 428 So2d 406, 409 [La]). It is the reasonableness of the

belief, not the state of mind of the attorney, that is determinative.

Petitioner's course of conduct satisfies any standard other than "constitutional malice," and therefore Charge One must be sustained.

We have examined petitioner's remaining contentions and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

* * * * * * * * * * * * * *

Order affirmed, without costs. Opinion Per Curiam. Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur. Chief Judge Wachtler took no part.

Decided July 1, 1991

APPENDIX B

[Decision and Order of the Supreme Court of New York, Appellate Division, Second Department, July 17, 1990]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7690W
B/ep

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
VINCENT R. BALLETTA, JR., JJ.

Motion No. 571 Atty.

DECISION & ORDER

In the Matter of the Application
of Elizabeth Holtzman, petitioner,
To Vacate a Letter of Reprimand
Pursuant to Section 691.6(a) of
the Rules of the Appellate
Division, Second Department,

Grievance Committee for the Tenth
Judicial District, respondent.

Petition, pursuant to § 691.6(a) of the rules of this court, by Elizabeth Holtzman to vacate a Letter of Reprimand dated October 19, 1989, issued by the Grievance Committee for the Tenth Judicial District. Petitioner Holtzman is an attorney admitted to the practice of law by this Court on March 16, 1966 and was at the time of the alleged misconduct the District Attorney of Kings County.

At a meeting held on June 8, 1988, the Grievance Committee for the Tenth Judicial District voted to admonish Ms. Holtzman for making public a letter containing specific allegations of misconduct by a judge without first determining the certainty of the merit of those accusations; for requiring that the complaining witness be brought to Ms. Holtzman's office, questioned, and videotaped under oath; and thereafter, releasing the audio of that tape to the media, despite Ms. Holtzman's knowledge that this witness would be a necessary witness in the two independent investigations of this incident which Ms. Holtzman's letters had triggered. In addition, the Committee disapproved of Ms. Holtzman's press release of December 22, 1987, which, rather than alleviating the situation, further demeaned the judge by referring to other allegations of misconduct by the judge known to Ms. Holtzman, in violation of DR 8-102(B), DR 1-102(A)(5)(6) [*sic*] and EC 8-6 of the Code of Professional Responsibility. The Letter of Admonition was issued on June 17, 1988.

[2] On July 15, 1988, Ms. Holtzman requested a subcommittee hearing pursuant to § 691.6 of the rules of this court, which request was granted. The petitioner was served with a notice of hearing and statement of charges dated October 19, 1988, alleging three charges of professional misconduct generally stated as follows: (1) releasing a copy of a letter to the public, written by Ms. Holtzman as District Attorney to Judge Kathryn McDonald, accusing Judge Irving Levine of misconduct without first determining the certainty of the merit of the accusations; (2) causing a witness to be summoned and interrogated without a valid public purpose; and (3) issuing a press release on December 22, 1987, stating that she had knowledge of other allegations of misconduct by the judge after a report was issued by Judge Keating, which stated that the accusations in Ms. Holtzman's letter to Judge McDonald were unfounded.

Hearings were held on December 7 and 16, 1988; January 17, February 1, March 7 and 8, April 28, May 26, June 9 and September 13, 1989. The findings of the subcommittee were presented to the Grievance Committee on October 4,

1989. The Committee sustained only two charges and voted to issue Ms. Holtzman a Letter of Reprimand.

The Letter of Reprimand dated October 19, 1989 was based upon Ms. Holtzman's releasing a letter written to Judge McDonald to the public (Charge One) and for issuing a press release on December 22, 1987, which stated that Ms. Holtzman had knowledge of other allegations of misconduct involving Judge Levine (Charge Three). The Committee found petitioner's conduct prejudicial to the administration of justice and adversely reflected on her fitness to practice law.

Ms. Holtzman now petitions this court to vacate the Letter of Reprimand.

We have considered the entire record in this matter and find that petitioner Holtzman is guilty only of Charge One in the Statement of Charges, which alleged, *inter alia*, that Ms. Holtzman, as District Attorney of Kings County, made public accusations of misconduct against a judge without first determining the certainty of the merits of the accusations in violation of DR 8-102 and DR 1-102(A)(6).

Upon the papers filed in support of the petition and the papers filed in opposition thereto, it is

ORDERED that the petitioner's motion to vacate the Letter of Reprimand dated October 19, 1989 is denied; and it is further,

ORDERED that the Letter of Reprimand be modified to reflect that it is based only upon the first charge; and it is further,

ORDERED that the petitioner's request for oral argument is denied.

MANGANO, P.J., THOMPSON, BRACKEN, BROWN and BALLETTA, J.J., concur.

ENTER:

/s/ MARTIN H. BROWNSTEIN

Martin H. Brownstein
Clerk

July 17, 1990

MATTER OF HOLTZMAN, ELIZABETH

APPENDIX C

[Letter of Reprimand, October 19, 1989]

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT

900 ELLISON AVENUE
SUITE 304
[SEAL] WESTBURY, N.Y. 11590
(516) 832-8585

HON. CATHERINE T. ENGLAND
CHAIRWOMAN

FRANK A. FINNERTY, JR.
CHIEF COUNSEL

GRACE D. MORAN
DEPUTY COUNSEL

ROBERT P. GUIDO
ASSISTANT COUNSEL

MURIEL L. GENNOSA
ASSISTANT COUNSEL

NANCY A. BOLGER
ASSISTANT COUNSEL

CHRIS G. McDONOUGH
ASSISTANT COUNSEL

HAND DELIVERED

October 19, 1989

Personal and Confidential

Elizabeth Holtzman, Esq.
District Attorney's Office
Kings County
210 Joralemon Street
Brooklyn, NY 11201

Re: File No. I-91-88

Dear Ms. Holtzman:

Please be advised that at a meeting held on June 8, 1988, the Grievance Committee for the Tenth Judicial District considered a complaint filed against you by Judge Albert M. Rosenblatt. The complaint involved the allegation that you had released to the press a copy of a letter you had sent to Judge Kathryn McDonald in which you made allegations of misconduct against Judge Irving Levine.

At that meeting the Grievance Committee for the Tenth Judicial District voted to issue you a Letter of Admonition concerning said complaint.

On July 15, 1988, you requested a subcommittee hearing pursuant to Section 691.6 of the Rules of the Appellate Division, Second Department.

A subcommittee hearing was held on December 7, 16, 1988, January 17, February 1, March 7, 8, April 28, May 26, June 9, September 13, 1989, and its findings were presented to the Grievance Committee on October 4, 1989. The Committee sustained Charges One and Three of the Statement of Charges and voted to issue to you a LETTER OF REPRIMAND pursuant to Section 691.6 of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department, for releasing your letter to Judge McDonald to the public and for issuing a press release on December 22, 1987, which stated that you had knowledge of other allegations of misconduct involving Judge Levine. The aforesaid conduct is prejudicial to the administration of justice and adversely reflects on your fitness to practice law in violation of DR 1-102(A)(5) and (6) of the Code of Professional Responsibility.

[2] This letter is issued in accordance with the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department, Section 691.6, to which you should refer concerning your rights.

This reprimand is the most severe sanction this Committee can issue short of a recommendation for formal disciplinary proceedings before the Appellate Division.

Also, in accordance with Section 691.6, Judge Albert M. Rosenblatt will not receive a copy of this letter, but will be notified that you have been reprimanded in this matter.

Very truly yours,

/s/ CATHERINE T. ENGLAND

Catherine T. England
Chairwoman

CTE:emh
cc: Wachtell, Lipton, Rosen & Katz, Esqs.

APPENDIX D

[Grievance Committee's Exhibit 6: Letter to Judge Kathryn McDonald from District Attorney Elizabeth Holtzman, December 1, 1987]

DISTRICT ATTORNEY OF KINGS COUNTY
MUNICIPAL BUILDING
BROOKLYN, N.Y. 11201
(718) 802-2000

[SEAL]

ELIZABETH HOLTZMAN
DISTRICT ATTORNEY

December 1, 1987

Hon. Kathryn McDonald
Chair
Committee to Implement Recommendations of the
New York Task Force on Women in the Courts
New York City Family Court
80 Centre Street
New York, New York 10013

Dear Judge McDonald:

I wish to bring to your attention certain egregious behavior of Judge Irving Levine, an elected Civil Court Judge in Kings County, which warrants the most severe disciplinary measures. The incident described was reported to me by the Assistant District Attorney who witnessed it.

On September 28, 1987, Judge Levine was sitting on a non-jury case involving a criminal complaint of sexual misconduct by the defendant. During the trial, the victim, an adult woman, testified that the defendant and two others acting in concert had first taken money from her. Afterwards, she was forced to the floor on her hands and knees and sexually assaulted from the rear. The victim also testified that during the sexual assault she was able to see under her left arm the

defendant standing next to a window with money in his hand.

On cross-examination, the victim was subjected to very detailed questions about the position she was in that enabled her to see the defendant.

Judge Levine also asked the victim several questions about her position. Claiming not to be satisfied with the answers, Judge Levine asked the Assistant District Attorney, defense counsel, defendant, court officer and court reporter to join him in the robing room, where the judge then asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted and saw the defendant. The victim stared at the judge in disbelief, but he repeated his direction and the victim reluctantly got down on her hands and her knees as everyone stood and watched.

[2] In making the victim assume the position she was forced to take when she was sexual assaulted, Judge Levine profoundly degraded, humiliated and demeaned her. Making her relive the anguish of the experience so graphically, and forcing her to do so before a group of strangers including the defendant, one of the very people she believed responsible for the sexual assault, exposed the witness to extreme psychological pain. In addition, such conduct can convert a judicial proceeding designed to determine the truth of a serious criminal charge into an avenue for inappropriate sexual titillation.

A judge who degrades a victim of a sexual assault is not fit for the bench. I would appreciate your assistance in seeing that this conduct is appropriately dealt with.

Sincerely,

/s/ ELIZABETH HOLTZMAN

Elizabeth Holtzman
District Attorney
Kings County

EH:BFN:gj

APPENDIX E

[Grievance Committee's Exhibit 3 (Excerpt): Affirmation of ADA Gary Farrell, November 25, 1987]

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, —against— [JOHN ROE], Defendant.	AFFIRMATION IN SUPPORT OF MOTION TO UNSEAL THE RECORD Kings County Docket Number: 6K067398

GARY FARRELL, an attorney-at-law admitted to practice in the State of New York and an Assistant District Attorney in the Office of Elizabeth Holtzman, District Attorney of Kings County, hereby affirms the following under the penalties of perjury:

1. This affirmation is submitted in support of the People's motion to unseal the minutes of the September 28-30, 1987 trial, including a September 29, 1987 in camera demonstration in the above case.

2. This affirmation is made both upon personal knowledge, which I obtained as the prosecutor in this case, and upon information and belief based upon the records and files of the Kings County District Attorney's Office.

3. On February 4, 1986 the defendant and two unapprehended men forced an adult woman into an abandoned building; the defendant allegedly took $10 from the woman; one of the defendant's unapprehended accomplices made her get down on her hands and knees and sexually assaulted her.

4. By misdemeanor information, defendant was charged acting [*sic*] in concert with Sexual Misconduct (P.L. §130.20),

Sexual Abuse in the Third Degree (P.L. §130.55), and Petit Larceny (P.L. §155.25).

5. On September 28-30, 1987, defendant was tried before Judge Irving Levine, having waived his right to a jury trial. During cross-examination of the woman victim, Judge Levine asked her to go into the robing room and to demonstrate the position in which she was sexually assaulted and how she had observed defendant during the sexual assault. The woman was reluctant to do this. Judge Levine, however, insisted that she conduct this demonstration. She ultimately did bend down on her hands and knees in front of defendant, defense counsel, the judge, various court personnel and me.

6. On September 30, 1987, Judge Levine acquitted the defendant of all charges.

7. The People need access to the trial transcript in this case in connection with filing a complaint of misconduct by Judge Levine with the State Commission on Judicial Conduct and the Administrative Judge of Criminal Court.

WHEREFORE, an order should be entered unsealing and making available to the Kings County District Attorney the transcript of the trial in People v. [John Roe], Kings County Docket Number 6K067398, and for such other and further relief as this Court may find just and proper.

Dated: Brooklyn, New York
November 25, 1987

/s/ GARY FARRELL
Gary Farrell
Assistant District Attorney

APPENDIX F

[Grievance Committee's Exhibit 2: Memorandum of ADA Gary Farrell, November 18, 1987]

M E M O R A N D U M

TO: Barbara F. Newman

FROM: Gary Farrell

DATE: November 18, 1987

SUBJECT: Judge Irving Levine

People v. [John Roe]

On September 28, 1987, in Jury Part VIII, I began a trial before Judge Irving Levine. After Judge Levine ruled that the People could inquire about the defendant's previous convictions if he testified, the defendant's attorney, Paul Ascher, waived his client's right to a jury trial.

The complainant in this case was a thirty-two year old woman named [the victim.] She testified on direct examination that during the early morning hours of a day in February of 1986, she was taken to an abandoned building by three men who came up behind her as she was walking home. [The victim] did not recognize any of the men, however, she could see that they were Rastafarians. One of the men placed a hard object into her back and told her he would kill her if she didn't do what the men wanted. [The victim] testified that once inside the building one of the men reached into her pants' pocket and removed approximately ten dollars. This man told the other two men, "she don't got much money," to which one responded, "Ya, but she got something else." [The victim] testified that at this point she was told to take off her pants or she would be killed. After she removed her

pants, she was forced to the floor on her hands and knees, whereupon one of the men put his penis into her vagina.

[The victim] testified that while she was being raped she was able to look under her left arm and see a man standing by the window with money in his hand. She was able to see his face because light from the street came in through that window. [The victim] testified that after the other man completed the sex act, she was told to count to one hundred very slowly. The three men then left the building. At the trial [the victim] identified the defendant as the man she saw by the window.

On cross-examination, [the victim] was subjected to very detailed questions about the position she was in which enabled [2] her to see the defendant. Judge Levine interposed several questions also trying to elicit [the victim's] precise position. Not satisfied with the answers he received, Judge Levine asked the lawyer, [the victim] and the court reporter to join him in the robing room. The Judge then asked [the victim] to demonstrate for him the position she was in when she saw the defendant. [The victim] responded by staring at the Judge in disbelief. Judge Levine then assured [the victim] that he only asked her to do this so he could get a clear picture in his mind as to what happened and not to embarrass her. [The victim] reluctantly bent down on her hands and knees as everyone stood and watched.

Judge Levine acquitted the defendant on all counts. He noted on the record that although he believed that [the victim] was telling the truth that she was raped, he was not convinced beyond a reasonable doubt that [John Roe] was in any way involved. The Judge also added that he did not believe that a woman who was "down like a dog with another man inside her" could concentrate enough to see and remember another man's face that she saw in a dark room for a short time. Finally, the Judge said that [the victim's] testimony "defied the laws of trigonmetry [*sic*]."

APPENDIX G

**[Grievance Committee's Exhibit 1:
Memorandum of ADA Gary Farrell,
November 12, 1987]**

M E M O R A N D U M

To: Rhonnie Broder

From: Gary Farrell

Re: People v. [John Roe]

Date: November 12, 1987

Facts

In the early morning hours on a day in February of 11986 [*sic*], a lady named [the victim] (32 years old) was walking home, having just left a subway station, when she noticed three Rastafarians (unfamiliar to her) standing on a corner. As she walked passed [*sic*] the trio, they fell in behind her and she felt a hard object pressed into her back. She was told not to turn around or she would be killed. They then guided her to an abandoned building a short distance away. She was led into a small room and told to face the wall. At this point a man reached into her pocket and removed some crumpled bills (about $10. in singles). This man told his friends, "she don't got much money," to which one responded, "Ya, but she got something else." [The victim] was then told to remove her pants or she would be killed. After she did this, she was guided down to the floor where she was on her hands and knees. One of the men then entered her vagina from behind her. During the time this man was inside her, she was able to look under her left arm and see a man standing by the window with money in his hand. She could see his face because light from the street came in through that window. The man raping her then pushed her head straight

down into the floor. After he finished the sex act, the man told [the victim] to count to one hundred before she left. All three men then left the building.

After waiting several minutes [the victim] returned to the subway station and called the police. The police responded and canvassed the area with [the victim], however, they did not find the perpetrators. [The victim] was then taken to a hospital where she was given a gynecological examination and released.

[2] In March of 1986, after missing several appointments, [the victim] went to the Brooklyn Catch Unit to view "mug" shots. After looking at several hundred, she picked out two pictures of the same man, [John Roe], and positively identified him. Detective Michael Chetchyl noted in one of his DD-5 follow-up reports that [the victim] said this man "raped and robbed her."

Detective Chetchyl made several unsuccessful attempts to find [John Roe]. However, in December of 1986, [John Roe] was arrested on an unrelated drug charge. Detective Chetchyl was then able to secure his attendance at a lineup which [the victim] viewed. [The victim] then picked out [John Roe] saying, "that's the one who robbed me."

The trial

In late September of 1986 I was assigned to finish a Wade hearing involving this case which Mark Irish had begun before Judge Firetog, the judge [*sic*] ruled that the identification procedures were proper and not unduly suggestive. The case was ultimately sent to Judge Levine for trial. After the judge ruled that the People could inquire about the defendant's previous convictions (guns and drugs) if he testified, the defense attorney (Paul Ascher) waived his client's right to a jury trial.

[The victim] was the first witness to testify for the People. When pressed on cross-examination she said that the only time she saw the defendant's face was for two to three seconds while she was being raped by the other man. The defense attorney was trying to elicit the precise position she

was in that enabled her to see his client. After the witness, who is not an educated person, tried to explain her position, Judge Levine interrupted her. The Judge then led the lawyers, the witness, a court officer and the court reporter into the back room. The Judge then told the witness that he wanted her to demonstrate the position she was in when she saw the defendant. The witness expressed some reluctance, but the Judge asured [*sic*] her that he only asked her to do this so he could get a clear picture in his mind as to what happened and not to embarrass her. The witness then bent down and showed how she could look under her left arm from that position.

[3] Judge Levine's Decision

During my summation I tried to make the point that although [the victim] only viewed the defendant a very short time, that it was enough for her to retain a picture of him in her mind. I stressed that she was sure it was him [*sic*] at the lineup and that she was sure it was him [*sic*] when she identified him in Court. At this point the Judge cut in and said that although he believed [the victim]—that he believed she was raped—he was not convinced beyond a reasonable doubt that this was the man who did it. He said that a woman in that position ("down like a dog") with "another man inside her" could not possibly concentrate enough to see and remember another man's face she saw in a dark room for a short time. He also added that "trigonometry" is important in this case. Judge Levine acquitted on all counts.

After he gave his verdict the Judge complimented my performance and said "you did the best you could with what you had." The Judge later told me that he really wanted to convict the guy, but couldn't based on the evidence he heard.

My feelings about Judge Levine

Although in retrospect I feel that Judge Levine's conduct with respect to the "demonstration" was improper, unnecessary and degrading to the witness, I truly believe that what motivated the Judge was primarily a sincere desire to find out

as much as he could about what happened on that night so he could fairly evaluate the evidence. Additionally I feel that although the Judge did use some sexist, coarse and completely inappropriate language when he rendered his decision he did reach a conclusion that was supported by the evidence—or lack of evidence—that he heard in this case.

(2)

Supreme Court, U.S.
FILED
OCT 7 1991
OFFICE OF THE CLERK

No. 91-401

In the

Supreme Court of the United States

October Term, 1991

ELIZABETH HOLTZMAN,
Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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On the Brief:
GRACE D. MORAN
CHRIS G. McDONOUGH

QUESTIONS PRESENTED

1) Accepting that attorneys have a constitutionally protected right to criticize judges and courts, may a state nonetheless privately reprimand an attorney for making highly publicized, demonstrably false specific allegations of misconduct against a named judge, based on that judge's conduct in a concluded proceeding, where the disciplining authority has found that the attorney's conduct in making such accusations was unreasonable and irresponsible and could only be considered protected speech if held protected by this Court's "constitutional malice" standard, as articulated in St. Amant v. Thompson, 390 U.S. 727 (1968)?

2) Is DR 1-102(A)(6), presently DR 1-102(A)(7), of New York's Code of Professional Responsibility which states "A lawyer shall not... [e]ngage in any other conduct that adversely reflects on [her] fitness to practice law", unconstitutionally vague or overbroad as applied to attorney speech?

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STATEMENT OF CASE

On December 1, 1987 Elizabeth Holtzman, then the District Attorney of Kings County, New York, released a letter addressed to Judge Kathryn McDonald, Chair of the Task Force on Women in the Courts, to the press. The letter accused Judge Irving Levine of having made a victim demonstrate the position she was in when raped. Petitioner claimed that the demonstration took place during a trial (People v. Roe) before Judge Levine in the presence of the assistant district attorney, defense counsel, court reporter and court officer. Petitioner further claimed that the victim had been humiliated, demeaned, degraded and exposed to extreme psychological pain. (Pet. App. D).

Prior to publicizing these serious charges District Attorney Holtzman had not reviewed the minutes of the trial, nor had she met with or spoken to Gary Farrell, the inexperienced assistant district attorney who tried the misdemeanor case (Tr. 1605), despite questioning his judgment in not objecting to the demonstration. (Tr. 79-80). Petitioner made no effort to contact any of the eyewitnesses nor the complaining witness, despite the fact that her letter described this woman's reactions to the alleged demonstration. (Tr. 88-89).

Petitioner released her letter in the face of strenuous and unanimous opposition from her senior staff, who repeatedly advised her to

at the very least wait for the trial transcript. (Tr. 69-70).

In making and publicizing the accusations Petitioner relied on intraoffice memoranda prepared by Farrell six weeks after the trial ended in an acquittal, and on a brief affirmation submitted by Farrell on a motion to unseal the People v. Roe minutes. This order was signed the day before the letter was released. On the same day, Barbara Newman, Chief of the Sex Crimes Unit, executed a rush order to expedite the minutes (Tr. 334-36, 340) and advised Petitioner in a note that Farrell was no longer sure of a detail but "the minutes will clarify this." (Tr. 461).

On the day of publication, December 1, 1987, Chief Assistant District Attorney William Donnino learned that a "press alert", an advisory to the press that a major piece of news would be forthcoming, had been issued. (Tr. 77). This information upset Donnino who had previously urged Petitioner not to put words in the complaining witness' mouth without first speaking with her. (Tr. 53). On December 1, Petitioner telephoned her office from her car phone and spoke with Newman who told her that she, Donnino and Barbara Underwood, Chief of Appeals and Counsel to the District Attorney, all opposed releasing the letter without the trial transcript. (Tr. 344-45). When Petitioner returned to

the office she met with Donnino and Underwood. After telling Petitioner that it would be legal and ethical to publish the letter (Tr. 68), Underwood nonetheless insisted that the Petitioner should wait for the minutes. (Tr. 513).

Underwood "thought the transcript might well show a justification for the demonstration and make it either inappropriate to make the complaint at all or not make it in the form it was being made." (Tr. 513). Underwood described a series of hypotheticals that "might mitigate or exculpate the Judge's conduct in this particular case and therefore constitute reasons for not publishing the complaint." (Tr. 71). Petitioner, despite the fact

that she had never tried a criminal case (Tr. 1914), responded that no such justification could exist. (Tr. 513-16).

When the Roe minutes were obtained, they unequivocally refuted Petitioner's allegations by, inter alia, establishing that it was the defense counsel who sought a demonstration and not the Judge. In addition, the transcript revealed that rather than the judge compelling any demonstration, he said "Hold it", immediately following counsel's request to the complaining witness. (Roe Tr. 62-65).

The Appellate Division of the Supreme Court of the State of New York, Second Department, found that Petitioner's accusations were false.

(Pet. App. B). The New York State Court of Appeals held that finding to be supported by the record. In re Holtzman, 78 N.Y.2d 184, 190 (1991).

The New York State Court of Appeals, in a 6-0 decision, rejected Petitioner's argument that her conduct was not proscribed by the Code of Professional Responsibility, and held that her public dissemination of a specific accusation of improper judicial conduct under the circumstances described could be held to reflect adversely on her fitness to practice law. Id. at 191.

Reasons to Deny the Writ

Petitioner has been issued a private letter of reprimand for irresponsible conduct, a component of which

involved speech. The decision below concentrated on Petitioner's reckless, single-minded rush to publicize her fact-specific unsupported accusations, without waiting for readily available evidence to validate or rebut her serious charges of judicial misconduct.

Petitioner, despite her efforts to recast her conduct, was not disciplined for expressing mere criticism or opinion about a judge or the judicial system, and nothing in the opinion below can be interpreted as an attempt to insulate judges from such protected expressions.

This Court, in Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), recognized that the protection to be afforded attorney speech must be determined by taking into account the

state interest in regulating a specialized profession, and the interest or interests served by allowing such particular regulation of attorney speech. Id. at 2744-45. Petitioner's argument for protection equal to that enjoyed by press and public in defamation cases fails to recognize that different societal interests are involved, In re Terry, 394 N.E.2d 94, 95 (Ind. 1979), cert. denied, 444 U.S. 1077 (1980); In re Graham, 453 N.W.2d 313, 322 (Minn.) cert. denied, 111 S. Ct. 67 (1990); In re Westfall, 808 S.W.2d 829, 836-37 (Mo. 1991), petition for cert. filed, 60 U.S.L.W. _____ (U.S. Sept. 9, 1991) (No. 91-_____), and that the state has a compelling interest in maintaining the public's confidence in

its system of justice, as well as in assuring that attorneys act responsibly. The adverse impact of irresponsible, false accusations on public confidence in the judicial system, and what Petitioner's conduct as demonstrated in the instant matter reveals about her fitness to practice law, justifies the discipline imposed on her.

Petitioner's argument that DR 1-102(A)(6) is vague or overbroad ignores the fact that codes of professional conduct need not be drawn with the same specificity required for statutes applicable to non-lawyers. In comparing her conduct with that of Gentile, Petitioner disregards that while Gentile was misled by an illusory safe harbor, Gentile, 111 S.

Ct. at 2731, Petitioner willfully ignored advice that releasing her accusations without the minutes would be improper.

It is submitted that this case would have had the same outcome in any of the eighteen other states whose decisions Petitioner cites, and that this Court's decision in Gentile creates no conflict with the decision below.

ARGUMENT

POINT I

NEW YORK CORRECTLY APPLIED AN OBJECTIVE STANDARD IN DISCIPLINING THE PETITIONER FOR CONDUCT WHICH VIOLATED EVERY STANDARD EXCEPT "CONSTITUTIONAL MALICE"

As the Court of Appeals made clear, Petitioner was not reprimanded

for expressions of generalized criticism or opinion about a judge or the courts, but rather for releasing to the media a false accusation of specific wrongdoing aimed at a named judge, without any support other than the intraoffice memoranda of a newly admitted trial assistant, and without waiting for the already ordered minutes which would have shown her allegations to be false. Holtzman, 78 N.Y.2d at 191. No decision by the high court of any state has been found which suggests that the conduct evidenced here is insufficient as a basis for disciplining an attorney, nor does any decision of this Court hold that speech by an attorney, under the circumstances presented in this

matter, enjoys constitutional protection.

Here, New York has protected a compelling state interest in regulating the legal profession; a right recognized by this Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975),:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions....The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice.

Id. at 792 (citations omitted); see also, Westfall, 808 S.W.2d at 836;

Graham, 453 N.W.2d at 322 ("This court certifies attorneys for practice to protect the public and the administration of justice").

Integral thereto is the state's interest in protecting the legal system from unwarranted attacks by attorneys upon the integrity of its most visual component, its judges. The New York State Court of Appeals plainly recognized this compelling state interest of maintaining the integrity of its courts and the public confidence therein. Holtzman, 78 N.Y.2d at 192-93. While this interest is not as immediate or obvious as the interest recognized in Gentile, 111 S. Ct. at 2745 (state interest in preserving the fundamental right to a fair trial), it is no less real and

it is deserving of recognition.

In New York, the Code of Professional Responsibility encourages attorneys to engage in justified criticism directed toward improvement of the legal system. Code of Professional Responsibility EC 8-6 (Appendix to Jud. Law McKinney 1981 & Supp. 1991). However, for a state to permit its system of justice to be unnecessarily and irresponsibly undermined by false accusations of judicial misconduct is to endanger the authority of the courts and to invite instances of self-help on the part of the public. In his dissent in Matter of Fuchsberg, 426 N.Y.S.2d 639 (Ct. on the Jud. 1978), then Justice Simons (presently a member of the Court of Appeals), succinctly stated tne

interest involved here:

> ...the impartiality of its judges and the integrity of the court's decisions. The public interest requires that neither be compromised in appearance or in fact for the public must respect the courts and the Judges of the court must deserve the respect of the public. That is the bedrock upon which our system of law is built for the courts have little else to enforce compliance with their judgments other than the acceptability of them borne of public respect. The public need not always be convinced of the correctness of the court's decisions but they must always believe in the integrity of the decision-making process.

Id. at 666-67.

Moreover, in protecting the aforementioned interest, the Court of

Appeals acted in as narrow a fashion as possible by measuring Petitioner's conduct against the standard of a reasonable attorney. Holtzman, 78 N.Y.2d at 192-93.

* * *

Although the state decisions cited by Petitioner have utilized differing analyses, none has applied to attorney misconduct proceedings the subjective standard enunciated in St. Amant v. Thompson, 390 U.S. 727 (1968), and only two states appear to have applied defamation standards. See Ramirez v. State Bar, 28 Cal.3d 402, 411, 619 P.2d 399, 404, 169 Cal. Rptr. 206, 211 (1980); Committee on Legal Ethics v. Douglas, 270 S.E.2d 325, 332 (W.Va. 1988), cert. denied,

110 S. Ct. 406 (1989); Committee on Legal Ethics v. Farber, 1991 W.Va. LEXIS 70 (June 27, 1991). Thus, Petitioner's contention that decisions of nineteen states are in disarray with respect to attorney speech about the judiciary is misleading.

The Supreme Court of California, in Ramirez, suspended the attorney despite his continued protestations of his belief in the truth of his charges against the judiciary. The court held that the demeaning statements had been made with a reckless disregard of the truth, citing Garrison. Id. at 411, 619 P.2d at 404, 169 Cal. Rptr. at 211. Comparatively, in the instant case Petitioner's persistent claims as to the truth of her accusations were

rejected as being disproved by the record and recklessly made. Holtzman, 78 N.Y.2d at 190. After measuring her conduct by the narrow test of what reasonable attorneys would have done in similar circumstances, and noting what three experienced attorneys actually advised her to do, the court neld her conduct reckless and irresponsible and deserving of discipline. Id. at 192-93.

In West Virginia, the Supreme Court of Appeals, in Douglas, remanded the case for further development of the facts after stating (incorrectly, as is now clear), that New York had impliedly adopted a defamation standard in attorney misconduct cases, citing Baker. Douglas, 370 S.E.2d at

330 (citing Baker v. Monroe County Bar Ass'n, 34 A.D.2d 229, 311 N.Y.S.2d 70 (4th Dep't 1970), aff'd, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837, cert. denied, 404 U.S. 915 [1971]). The court indicated its willingness to apply Garrison to these matters. Id. at 329.

Thereafter, in Farber, the West Virginia court publicly disciplined an attorney for his accusations despite the attorney's claim of a personal belief in the accuracy of the statements. Farber, 1991 W.Va. LEXIS at 31.

The Supreme Court of Washington, in In re Kaiser, 111 Wash.2d 275, 759 P.2d 392 (1988), interpreted a prior decision of that

court, In re Donohoe, 90 Wash.2d 173, 580 P.2d 1093 (Wash. 1978), as having applied a subjective standard to attorney speech. Kaiser, 111 Wash.2d at 285, 759 P.2d at 398. However, the Kaiser court noted that Donohoe had actual knowledge of the falsity of her statements and, like the New York court in Baker, found no constitutional protection. Id. Both courts disciplined the attorneys in question.

Nothing in the aforementioned cases invites a conclusion that Petitioner's conduct would have enjoyed greater protection in these other jurisdictions. New York has long recognized the protection accorded attorney criticism and opinion about the judiciary. As the court made clear in Justices of the Appellate

Division v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973), even instances of vulgar disrespect by lawyers toward the judiciary, however ridiculous and patently untrue, are not subject to discipline. Id. at 559, 301 N.E.2d at 426, 347 N.Y.S.2d at 441.

Petitioner's publicized specific accusations were outside the scope of constitutionally protected criticism and opinion and adversely impacted on the compelling state interests of maintaining the integrity of its courts as well as protecting the public by demanding responsible conduct by attorneys. The court recognized that the harm here affected a different societal interest than that addressed in defamation actions

and the court correctly measured Petitioner's behavior against an objective standard of professional conduct.

POINT II

AS ENACTED AND AS APPLIED BY THE COURT OF APPEALS TO PETITIONER'S CONDUCT DR 1-102(A)(6) IS NEITHER VOID FOR VAGUENESS NOR OVERBROAD

The Code of Professional Responsibility is a code of professional conduct, not a penal or civil statutory scheme, and broader standards are often necessary. In re Charges of Professional Misconduct Against N.P., 361 N.W.2d 386 (Minn.), appeal dismissed, 474 U.S. 976 (1985). In 1856 this Court recognized that "it is difficult, if not impossible, to enumerate and define, with

legal precision, every offense for which an attorney can be removed". Ex parte Secombe, 60 U.S. 9, 14 (1856). Aside from being written by lawyers for lawyers, "more specific guidance is provided by caselaw, applicable court rules, and the lore of the profession". In re Snyder, 472 U.S. 634, 645 (1985).

The New York State Court of Appeals recently held in Niesig v. Team 1, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), that:

> [t]he disciplinary rules have a different provenance and purpose...The Code of Professional Responsibility is essentially the legal profession's document of self governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline.

Id. at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495.

The "provenance and purpose" referred to in Niesig is consistent with this Court's reasoning and holding in Parker v. Levy, 417 U.S. 733 (1974), where the appellee argued, inter alia, that Section 133 of the Uniform Code of Military Justice, which provides punishment for "conduct unbecoming an officer and a gentleman", failed to give him clear notice that his "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful" remarks were proscribed. Id. at 739. This Court, nowever, held that due to the different particular society served by the Uniform Code of Military Justice, Section 133 was

sufficient to give appellee notice. Id.

Petitioner claims that she was "in the dark as to whether" her conduct was proscribed (Pet. at 27); yet the record establishes that her senior staff unanimously urged her not to release the letter without checking the expedited transcript. Thus, it was apparent that the attorneys upon whom Petitioner relied knew the planned release to be improper conduct for an attorney.

In Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), this Court found Nevada Disciplinary Rule 177 vague due to the inclusion of an illusory safe harbor provision

(177[3]), and Gentile's conscious effort to comply therewith. Id. at 2731. In the instant matter, no such safe harbor exists to confuse the general mandate of DR 1-102(A)(6). In further contrast to Gentile, Petitioner rejected outright the considered advice of her senior staff in order to meet the demand created by her previously released press alert.

As applied, DR 1-102(A)(6) encompasses Petitioner's conduct and, when taken in context with all the ethical strictures contained in and referenced to the Code of Professional Responsibility, the rule certainly put Petitioner on notice that her conduct was violative.

In her overbroad challenge Petitioner has re-shaped her conduct

in an attempt to convince this Court that the Court of Appeals encroached upon her right of speech. However, the court pointedly indicated that Petitioner's actions, for which she earned her private reprimand were "not general criticism but rather release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant, aimed at a named judge". Holtzman, 78 N.Y.2d at 191.

Clearly Petitioner's conduct is a far cry from general criticism or opinion of the judiciary, as she would have this Court believe. Thus, as the Court of Appeals applied DR 1-102 (A)(6) to Petitioner's conduct in

connection with her reckless release of her accusations, the rule did not "sweep" into any constitutionally protected area.

CONCLUSION

Petitioner's conduct violated not only the Lawyer's Code of Professional Responsibility but also commonly accepted standards of decency and fairness. The court below properly upheld the private Letter of Reprimand issued to Petitioner. For a court to do otherwise, and to condone or even permit the recklessly irresponsible behavior exhibited by Petitioner, would be to render the Code of Professional Responsibility meaningless.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 7, 1991

On the Brief
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(3)

No. 91-401

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1991

ELIZABETH HOLTZMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This brief is respectfully submitted in reply to respondent's brief in opposition. Respondent's brief only serves to underscore why certiorari should be granted in this case.

1. It is undisputed—indeed, indisputable—that application of the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, would compel reversal. Respondent's brief (p. i) explicitly recognizes, as did the court below, that Holtzman's public accusation against Judge Levine would be constitutionally protected under that standard. Respondent thus confirms that this case, like *In re Westfall*, No. 91-429 (petition for certiorari pending), raises an important, but as yet unresolved, question under the First Amendment—whether the constitutional standard that gov-

erns civil and criminal liability for criticism of public officials also governs attorney disciplinary proceedings involving public criticism of judges, when the criticism could not prejudice any adjudicative proceeding. If the *New York Times* standard controls, the reprimand must fall. The question could not be more squarely and cleanly presented.

2. Respondent's attempt to minimize the importance of the conflict among the state courts falls of its own weight. For respondent necessarily admits that the state courts have applied "differing" federal constitutional standards in determining whether to discipline lawyers for making public accusations against judges. Br. Opp. 17. Respondent concedes that the California and West Virginia courts apply the constitutional "actual malice" standard,* and that the Washington courts apply an (even stricter) actual-knowledge-of-falsity test. (Respondent ignores the fact that the reprimand in this case would not survive the First Amendment standards applied in Tennessee and New Jersey. *See* Pet. 14-15.) At the other end of the broad spectrum of tests adopted by state courts, the court below adopted (and respondent's brief seeks to defend) a "reasonable lawyer" standard, essentially a negligence test.

Respondent's brief seeks to paper over these differences among the States by emphasizing that some attorneys have been disciplined even under the most speech-protective standards. But respondent does not and cannot dispute the existence of the multistate bazaar of conflicting First Amendment standards that now govern an important and frequently recurring type of core political speech. And respondent cannot escape the clear statement by the Court of Appeals that

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* Respondent's brief seems to labor under the puzzling misconception that the actual-malice standard of *New York Times* and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), somehow differs from the standard applied in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). The constitutional standard applied in these cases, however, is one and the same. *St. Amant* simply explained the meaning of the "reckless disregard" component of the *New York Times* "actual malice" standard.

petitioner's speech was protected under the "constitutional malice" standard established by the decisions of this Court.

3. Respondent seeks to minimize the importance of the constitutional issue in this case by contending that Holtzman was reprimanded for "irresponsible conduct, a component of which involves speech." Br. Opp. 7-8. Yet respondent's brief repeatedly refers to the public nature of petitioner's accusation, and, indeed, it was *precisely* the public release of the accusation that gave rise to the disciplinary proceedings below. To argue that this case involves primarily conduct, rather than speech, is to ignore that a central issue in constitutional defamation cases, starting with *New York Times Co.* v. *Sullivan*, is the extent to which a state may require the speaker to investigate the accuracy of a charge before making a public utterance. Whether such a duty exists lies at the heart of the constitutional issue in *New York Times*, *Garrison*, and *St. Amant*; it is the issue directly posed by this case. This case is about public speech, not conduct.

4. Finally, respondent's brief does not address the basic conflict between the decision below and this Court's opinion in *Gentile* v. *State Bar of Nevada*, 111 S. Ct. 2720 (1991). The "void for vagueness" issue presented by this case is whether a disciplinary rule that proscribes "conduct that adversely reflects on [a lawyer's] fitness to practice law" fails to provide "fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement." *Id.* at 2749 (O'Connor, J., concurring). Respondent attempts to avoid the conflict with *Gentile* by emphasizing this Court's reliance in that case on the safe-harbor provisions of the Nevada rule. But New York's Code of Professional Responsibility creates a harbor whose safety is even more illusory than that created by the Nevada rule. Petitioner contends that New York set a dangerous trap when it adopted DR 8-102(B)—a rule that sets forth a clear constitutional standard governing lawyers' accusations against judges, one that tracks the decisions of this Court—and then closed the trap by imposing discipline under DR 1-102(A)(6)—a catch-all that does not mention speech at all and had never been invoked in

New York to punish speech. In reality, New York's "safe harbor" is more akin to the Bermuda Triangle.

Moreover, the vagueness test propounded in *Gentile*—whether the disciplinary rule fails to provide fair notice and creates the possibility of discriminatory enforcement—is not limited to rules that create safe harbors. The language of DR 1-102(A)(6)—"conduct that adversely reflects on [a lawyer's] fitness to practice law"—is unconstitutionally vague as applied to public accusations against judges, because a lawyer has inadequate notice as to its meaning and because there is a palpable danger of discriminatory enforcement. Under *Gentile*, the New York Court of Appeals' construction of DR 1-102(A)(6) cannot stand.

* * *

From the early days of the Republic, long before *New York Times*, state and federal courts have struggled, time and again, with issues relating to the free speech rights of lawyers who would dare to criticize those courts.* Today, the most important of these issues remains unresolved: state courts, with great frequency, apply different constitutional standards in determining whether to discipline lawyers for their public accusations against judges. This constitutional conflict should be definitively resolved in the interest of the Nation's lawyers and judges, and in the interest of the public they both serve.

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* See, e.g., *Austin's Case*, 5 Rawle 191, 28 Am. Dec. 657 (Pa. 1835), and other cases cited in Annotation, *Criticism of Opinion or Decision of Court As Ground for Disbarment of Attorney*, 53 A.L.R. 1244 (1928), in addition to the more recent cases cited in the petition. *Austin's Case* held that "an attorney at law holds his office during good behavior, and . . . is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen." 28 Am. Dec. at 665.

CONCLUSION

The petition for a writ of certiorari should be granted. If the Court also grants certiorari in *In re Westfall*, No. 91-429, the cases should be set for oral argument in tandem.

Respectfully submitted,

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